IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 34620

WEST VIRGINIA MUTUAL INSURANCE COMPANY, formerly known as WEST VIRGINIA PHYSICIANS MUTUAL INSURANCE COMPANY, a corporation,

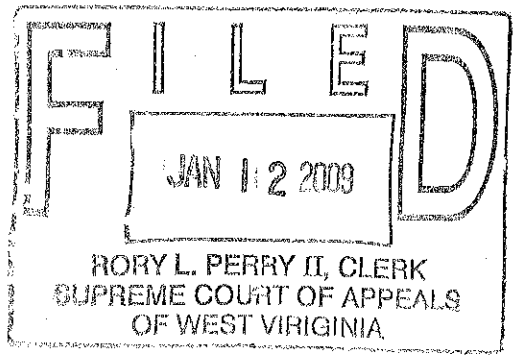
Appellant,

v.

ROBERT J. ZALESKI, M.D.,

Respondent.

BRIEF OF APPELLANT, WEST VIRGINIA MUTUAL INSURANCE COMPANY



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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This case is before the West Virginia Supreme Court of Appeals by way of the Ohio County Circuit Court's April 14, 2008 Order denying West Virginia Mutual Insurance Company's (hereinafter "Appellant" or "Mutual"), Motion for Reconsideration of its Motion to Dismiss, or in the Alternative Motion for Summary Judgment and also denying the Mutual's Motion for Entry of Order Granting Motion to Dismiss Pursuant to Rule 12(b)(6), the Mutual's Motion for Entry of Order Remanding the Non-renewal to the Mutual for Further Hearing and the circuit court's *sua sponte* amendment and entry of an Order amending the Mutual's non-renewal hearing procedures.

The Appellant, West Virginia Mutual Insurance Company, hereby files the following Brief pursuant to the December 9, 2008 Order of this Court granting Petition for Appeal of West Virginia Mutual Insurance Company From Rulings of the Circuit Court of Ohio County. For the reasons set forth herein, the West Virginia Supreme Court of Appeals should reverse the Ohio County Circuit Court's rulings on the Mutual's Motion for Reconsideration of its Motion to Dismiss, or in the Alternative Motion for Summary Judgment and the Mutual's Motion for Entry of Order Granting Motion to Dismiss pursuant to Rule 12(b)(6), the Mutual's motion for Entry of Order Remanding the Non-renewal to the Mutual for Further Hearing, and the Circuit Court's *sua sponte* amendment and entry of an Order amending the Mutual's non-renewal hearing procedures.

II. STATEMENT OF FACTS

The Mutual is a West Virginia domestic, private, nonstock, nonprofit corporation, formed in 2004 in response to the state's "medical liability insurance crisis." In 2001, the West Virginia Legislature declared there was a "nationwide crisis in the field of medical liability insurance" which was "particularly acute in

this State due to the small size of the insurance market." W. VA. CODE § 33-20F-2. To set the stage for formation of a physicians' mutual company, the Legislature took steps to "temporarily alleviate" the crisis by creating "programs to provide medical liability coverage through the board of risk and insurance management." *Id.*

On July 1, 2004, the Mutual accepted the transfer of all medical liability insurance obligations and risks associated with existing policies issued by the West Virginia Board of Risk and Insurance Management (hereinafter "BRIM"). W. VA. CODE § 33-20F-9(b)(1). As with any other insurer, the Appellant immediately had the right to decline to renew the policies of physicians whose prior loss experience or current training and capabilities created an unacceptable risk. W. VA. CODE §§ 33-20F-9(f)(4).[1]

Dr. Robert J. Zaleski (hereinafter referred to as "Respondent" or "Dr. Zaleski") is an orthopedic surgeon practicing in Wheeling, West Virginia. *See*, April 27, 2006 Order Granting Partial Summary Judgment to Plaintiff, at pg. 1, ¶1, in the Record. He purchased a policy from BRIM providing coverage for claims made during the period from December 22, 2001 to December 22, 2004. *Id.* After Dr. Zaleski's BRIM policy was transferred to the Appellant along with all other BRIM

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[1] W. VA. CODE §§ 33-20F-9(f)(4) states that:

Notwithstanding the provisions of subsection (b), (c) or (e) of this section, the company may:

> (4) Except with respect to policies transferred from the board of risk and insurance management under this section, refuse to provide insurance coverage for individual physicians whose prior loss experience or current professional training and capability are such that the physician represents an unacceptable risk of loss if coverage is provided.

Based upon the above language, although the Appellant may not have had the right to refuse to accept all of the policies transferred from BRIM, the legislature did not intend that the Appellant would not have the right to non-renew those insureds' policies that it believed to be an unacceptable risk. In fact, as this Court has recognized in Footnote 14 to the *Zaleski* decision, there is no question that the Mutual has the authority to refuse to renew medical liability policies and this decision is reserved to the Mutual by W.Va. Code §33-20F-9.

physician policies, the Appellant reviewed his prior loss experience and current professional training and experience prior to the end of the policy term and determined that he represented an unacceptable underwriting risk. Accordingly, Dr. Zaleski was notified by certified letter dated September 8, 2004 that the Appellant would not renew his existing policy following its natural expiration on December 22, 2004. *Id.* at pg. 2, ¶3.

Dr. Zaleski requested an appeal of the non-renewal of his policy by letter addressed to the Appellant dated September 23, 2004. *Id.* at pg. 2, ¶5. The Appellant advised Dr. Zaleski by certified letter dated October 4, 2004 that a hearing concerning his request would be held on October 9, 2004 in Charleston, West Virginia. *Id.* at pg. 2, ¶6. Dr. Zaleski advised the Appellant that he was unable to appear at the scheduled hearing. *Id.* at pg. 2, ¶7. As a result, the hearing was rescheduled for November 11, 2004. *Id.* at pg. 2, ¶8. The Appellant provided Dr. Zaleski with a thorough written description of the appeal process.[2] *Id.* at pg. 2-3, ¶ 9.

Dr. Zaleski appeared in person before the Appellant's Underwriting Committee, presented evidence, and responded to questions posed by Committee members. Dr. Zaleski's claim history revealed that 19 medical malpractice claims were asserted against him during his 25 years of practice, resulting in the payment of $2,042,447 in indemnity settlements. *Id.* at pg. 3, ¶12. After considering Dr. Zaleski's appeal, the committee decided to uphold the underwriting decision to

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[2] The written description advised that: (1) coverage was declined by underwriting; (2) an appeal was requested by the Physician; (3) the Physician was requested to make a brief statement to the Underwriting Committee, could ask questions of the Committee, and could entertain questions from Committee members; (4) the Committee would review the application for coverage and the information gathered during the appeal and make a decision immediately following the Physician's appearance before the Committee; and (5) the Physician would receive a telephone call from a representative of the Committee the day following the appeal and a follow-up letter by mail. *See,* April 27, 2006 Order Granting Partial Summary Judgment to Plaintiff, at pg. 2, ¶9, in the Record.

nonrenew. *Id.* at pg. 5, ¶18.

The decision not to renew Dr. Zaleski's policy was a rare decision by the Appellant. When the Appellant was created, 1470 BRIM policies were transferred to it. *Id.* at pg. 5, ¶19. The Appellant renewed all but 20 of the original BRIM policies transferred to it when they came up for renewal. *Id.*

The Underwriting Committee considered five appeals of decisions made by underwriting not to renew on the same day it considered Dr. Zaleski's appeal. *Id.* at pg. 5, ¶18. The Committee only upheld the decision not to renew Dr. Zaleski's policy and the policy of one other physician. *Id.* The decision to uphold the non-renewal of Dr. Zaleski's policy was unanimous. *Id.* Dr. Zaleski was notified of the decision by telephone the day after the hearing, as well as by certified mail on November 12, 2004. *Id.* at pg. 5, ¶20.

By letter dated November 30, 2004, Dr. Zaleski requested that the Appellant provide a detailed explanation for his non-renewal. *Id.* at pg. 5, ¶22. Before the Appellant had an opportunity to respond, Dr. Zaleski sent the Insurance Commissioner a letter he described as a "formal complaint." *Id.* at pg. 6, ¶23. The Insurance Commissioner forwarded Dr. Zaleski's complaint to the Appellant that same day, requesting a written response. *Id.* at pg. 6, ¶24 On December 15, 2004, the Appellant responded in writing, setting forth its reasons for nonrenewal which included the "frequency of lawsuits in his history." *Id.* at pg. 5, ¶22. The Insurance Commissioner provided Dr. Zaleski with a copy of this letter the following day. *Id.*

The Insurance Commissioner chose not to take administrative action against the Appellant, stating "it does not appear that [the Mutual] has violated any applicable statute or rule," and advised Dr. Zaleski of this decision. *Id.* at pg. 6, ¶26. Although Dr. Zaleski had the opportunity to request a hearing and appeal the Insurance Commissioner's decision to the Circuit Court of Kanawha County,

pursuant to W.Va. Code §33-2-14, he chose not to exercise his only real form of appellate relief. *Id.* at pg. 6, ¶28.

Instead, on April 4, 2005, Dr. Zaleski filed the instant action in the Circuit Court of Ohio County, West Virginia, asserting claims for breach of the covenant of good faith and fair dealing; arbitrary and capricious conduct, breach of fiduciary duty, intentional infliction of emotional distress, and negligent infliction of emotional distress. *See,* Complaint, in the Record. All of the claims asserted in Dr. Zaleski's Complaint allegedly arose out of the Appellant's decision not to renew his insurance policy. *Id.* The Complaint demanded "judgment . . . for compensatory damages in an amount to be determined by a jury and to the extent that the jury may determine that the aforesaid acts constitute actual malice . . . punitive damages," as well as "an award of attorneys' fees and expenses, pre and post judgment interest and any other relief as determined by the Court." *Id.* at pg. 6.

On June 1, 2005, the Appellant filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, based on the claims set forth in Dr. Zaleski's Complaint. *See,* Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, in the Record. In response, Dr. Zaleski filed a Cross-Motion for Summary Judgment, which raised for the first time an allegation that the Appellant is a state actor, and as such, it owed him procedural due process under the Fourteenth Amendment of the United States Constitution and Article III, Section 10 of the West Virginia Constitution. *See,* Cross-Motion for Summary Judgment, pg. 6-16, in the Record. Further, Dr. Zaleski's Cross-Motion for Summary Judgment alleged that the Appellant failed to provide proper procedural due process in its decision not to renew his insurance policy. *Id.* On September 22, 2005, the Ohio County Circuit Court denied the Mutual's Motion to Dismiss, or in the Alternative Motion for Summary Judgment. *See,* Memorandum of Opinion and

Order, in the Record. As part of the same September 22, 2005 Order, the Court converted Dr. Zaleski's cross-motion into a Motion for Partial Summary Judgment and granted Dr. Zaleski partial summary judgment on the issue that the Appellant was a state actor. *Id.* at pg. 9. In the text of that September 22, 2005 Order, Judge Recht showed his bias against the Appellant and stated his position regarding the sufficiency of the Appellant's hearing procedures, calling the procedural due process offered by the Appellant to Dr. Zaleski "at best shallow and at worst a sham." *See,* the September 22, 2005 Order at 9, in the Record. Remarkably, he made this statement without having received any evidence or heard any argument on the sufficiency of the Mutual's hearing procedures up to that point. Later, during a November 15, 2005 hearing, Judge Recht acknowledged that he gotten carried away regarding this characterization of the Appellant's hearing procedures in his September 22, 2005 Order:

> **The Court:** I did– maybe I got carried away– that's maybe the only fun you have as a judge– where I said that the procedural due process offered by defendant was shallow at best and sham at worst. That probably was going a little too far. I apologize. But it just felt. . . .
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> **Mr. Johnson:** You said that kind of low. I don't know if the court reporter-
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> **The Court:** Well, she knows what to take down and what not to.

See, the November 15, 2005 hearing transcript, P. 6, l. 24; P. 7, l. 1-9, in the Record. [3]

On October 6, 2005 the Appellant filed a Motion to Alter or Amend the September 22, 2005 Order denying the Motion to Dismiss. *See,* the Motion to Dismiss, in the Record. That motion was denied by the Court on December 14,

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[3] Later, despite this apology, the Judge again referred to the hearing procedures of the Mutual as a shallow sham in a February 3, 2006 hearing. *See,* the February 3, 2006 hearing transcript, P. 14, l. 9-12, in the Record.

2005. *See,* the December 14, 2005 Order, in the Record.

Additionally, the Court ordered that the Appellant submit a procedure for affording a non-renewed policyholder the right to contest a decision not to renew. *Id.* On January 16, 2006, the Appellant filed the "Proposed Mechanism for Review and Appeal of Decisions Not to Renew Insurance Policies Submitted on Behalf of the West Virginia Physicians' Mutual Insurance Company Under Protest." *See,* Proposed Mechanism for Review and Appeal of Decisions Not to Renew Insurance Policies Submitted on Behalf of the West Virginia Physicians' Mutual Insurance Company Under Protest, in the Record. The Appellant set forth various objections, which included that the Ohio County Circuit Court improperly considered claims not asserted in the Complaint and granted relief not demanded in the Complaint. *Id.* at 1-2. Further, the Appellant raised the issue that the Court lacked subject matter jurisdiction, and the Court's action was premature without conducting an evidentiary hearing. *Id.* at 3-5. Finally, the Appellant again raised the objection that it was not a state actor, but even assuming for the sake of argument that it was a state actor, Dr. Zaleski was provided sufficient due process by the Appellant. *Id.* at 5-8. Additionally, pursuant to the court's order and under protest, the Appellant outlined a detailed procedural mechanism substantially the same as the one actually provided to Dr. Zaleski pursuant to W. VA. CODE § 33-2-14. *Id.* at 8-10.

On April 27, 2006, the Ohio County Circuit Court issued a final appealable order which reaffirmed its conclusion that the Appellant was a state actor, held it owed Dr. Zaleski the procedure set forth under W. VA. CODE § 33-2-13, and declared that Dr. Zaleski would have the right to appeal to the circuit court where the insured resides or in the Kanawha County Circuit Court pursuant to W. VA. CODE § 33-2-14. *See,* April 27, 2006 Order Granting Partial Summary Judgment to Plaintiff, in the Record. Further, the circuit court reaffirmed its denial of the

Mutual's Motion to Dismiss/Motion for Summary Judgment. *Id.* at pg. 7, ¶7. Without the benefit of a hearing, the circuit court ordered that the Appellant reinstate Dr. Zaleski's insurance. *Id.*

In the same Order, the circuit court denied the Appellant's motion to set aside its September 22, 2005 decision based on Dr. Zaleski's insufficient pleadings under Rule 8 of the West Virginia Rules of Civil Procedure or to force Dr. Zaleski to amend his pleadings, and the court denied its motion to dismiss for lack of subject matter jurisdiction. *Id.* at pg. 8. The circuit court acknowledged and overruled the defendant's arguments that the Appellant was not a state actor, that Dr. Zaleski received the appropriate legal procedure, and that the court's Order was invading the purview of the West Virginia Insurance Commissioner's Office. *Id.* at pg. 9-10. Finally, the circuit court overruled the Appellant's objection to the court deciding all the facts set forth in the Order without a hearing and denied the defendant's motion to have a hearing to establish a factual record regarding the appropriate procedural mechanism. *Id.* at pg. 10. The circuit court deemed its April 27, 2006 Order final and appealable pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure. *Id.*

In response to the September 22, 2005 and April 27, 2006 Orders, Petitioner filed an August 25, 2006 Petition for Appeal which was granted by the West Virginia Supreme Court of Appeals on November 28, 2006. *See,* the November 28, 2006 Order Granting Petition, in the Record. After briefs were filed, the Supreme Court issued a ruling on June 27, 2007. *See,* the June 27, 2007 Order, in the Record. In that Order, the Supreme Court reaffirmed the circuit court's finding that the Appellant was a state actor for the purposes of a physician seeking renewal of his malpractice insurance and that Dr. Zaleski had a property interest in continued medical liability coverage, which entitled him to due process protection of that

property interest. *Zaleski v. West Virginia Physicians' Mutual Ins.* Co., 220 W. Va. 311, 647 S.E.2d 747 (2007).

However, the West Virginia Supreme Court of Appeals did not adopt the circuit court's requirement that the due process procedure required of the Appellant mirror the procedure required of the Insurance Commissioner. Specifically, the Supreme Court found the requirements of the Insurance Commissioner to be too stringent, overly detailed and burdensome. *Id.* In order to guide the Appellant through its construction of its due process procedure, the Supreme Court set forth the minimum requirements for said procedure:

1. Notice of the non-renewal which conforms with the requirements of W.Va. Code §33-20C-4(a) and which includes the reasons for non-renewal;

2. Hearing before an unbiased hearing examiner;

3. Reasonable time in which to prepare to rebut the charges;

4. Opportunity to have retained counsel at any hearings on the charges;

5. Opportunity to present relevant evidence which includes calling and cross-examining witnesses;

6. Preservation of an adequate record of the review proceedings.

Id.

In its mandate to the circuit court, the West Virginia Supreme Court of Appeals stated:

> Therefore, the case is remanded to the Circuit Court of Ohio County with directions for that court to: ***(1) remand the question of non-renewal to the mutual for further hearing in conformity with this opinion,*** and (2) conduct such further proceedings not inconsistent with this opinion as may be required, including the resolution of any disputes which may arise in the course of the Mutual hearing on non-renewal.

Id. (emphasis added).

Procedurally, the effect of the *Zaleski* decision by the Supreme Court was to reverse the circuit court's decision to deny the Mutual's Motion to Dismiss, stating

that "insofar as it relates to the circuit court's denial of the Appellant's dismissal motion **and** order to reinstate insurance coverage, the same is hereby reversed." *Id.* (emphasis added). As such, the Ohio County Circuit Court, upon receipt of that decision, was required to reverse its earlier decision and to enter an Order granting the Mutual's Motion to Dismiss and dismissing the four counts in the Complaint. On the face of the Supreme Court's Order in *Zaleski*, by the Supreme Court's use of the word "and" in the phrase "insofar as it relates to the circuit court's denial of the Appellant's dismissal motion **and** order to reinstate insurance coverage," the circuit court was required to dismiss the four counts of the Complaint **and** also reverse the circuit court's order to reinstate insurance coverage. *Id.* (emphasis added). The reversal of both of these erroneous rulings is what the Supreme Court intended by its use of the phrase "the same is hereby reversed." As such, upon receipt of that mandate from the Supreme Court, Judge Recht should have had no other option but to enter an order dismissing the case and reversing his order to reinstate Dr. Zaleski's insurance coverage. However, he did neither.

The *Zaleski* decision further held that the case be remanded to the Ohio County Circuit Court with instructions that it "remand the question of non-renewal to Mutual for further hearing in conformity with this opinion..[,]" and that the circuit court "conduct such further proceedings not inconsistent with this opinion as may be required, including the resolution of any disputes which may arise in the course of the Mutual hearing on non-renewal." *Id.*

On July 18, 2007, Judge Recht sent a letter to counsel of record setting a status conference for September 7, 2007. *See,* the Mutual's March 7, 2008 Motion for Reconsideration, p. 6, in the Record. On September 6, 2007, the Appellant submitted the hearing procedures to Dr. Zaleski's counsel, James Companion. On September 7, 2007, the parties met for a scheduling conference, at which time a

deadline was given for Dr. Zaleski to object to the Mutual's Hearing Procedures for non-renewal, which was done over the objection from the Appellant that an evaluation of the procedures was outside the jurisdiction of the Court on remand and that the matter was not ripe for consideration by the circuit court. *Id.*

On September 21, 2007, Dr. Zaleski filed a Response to the Appellant's review process, expressing his objections to its content. *See,* the Response to Defendant's Response to Review Process, in the Record. On November 7, 2007, the Appellant filed a Reply to Dr. Zaleski's Response. *See,* the Reply to Plaintiff's Response to Defendant's Proposed Review Process, in the Record. The Appellant again voiced its objection and requested that the matter be remanded to the Appellant for further proceedings on the basis that an evaluation of the Mutual's Hearing Procedures was not ripe for consideration. *Id.*

On January 9, 2008, the Ohio County Circuit Court issued a letter to counsel for the Appellant, D.C. Offutt, Jr., instructing the Appellant that it had approved the Recommended Protocols for an Appropriate Review Process of a Decision by the Appellant, with three "major changes." *See,* the January 9, 2008 letter from Judge Recht, attached to Petitioner's Petition for Appeal as "Exhibit A," in the Record. Specifically, the Court ordered that; 1) the procedures developed by the Appellant be changed so that the entire burden of proof as to the reason for non-renewal would be on the Appellant; 2) that a provision be added to require the Appellant to inform an affected physician as to the scope of any appellate review; and 3) that the composition of the tribunal described in Item VIII of the proposed protocols provide a completely unbiased constituency, which did not include members of the Board of Directors of the Appellant. *Id.*

Counsel for the Appellant responded on February 12, 2008, objecting to the Court's attempt to alter the Hearing Procedures of the Mutual. At a hearing on

February 19, 2008, the parties and the Court agreed to address the issues which arose from the Court's January 9, 2008 letter by agreeing on an Order to protect the record.

On March 7, 2008, the Appellant filed a Motion to Reconsider the Court's decision made known to the parties in its January 9, 2008 letter, which found that "major changes" must be made to the Mutual's Hearing Procedures concerning non-renewal of physicians and requesting that the Court remand the case to the Appellant, as directed by the West Virginia Supreme Court of Appeals in *Zaleski*, 220 W. Va. 311, 647 S.E.2d 747. *See,* the Motion for Reconsideration, in the Record.

On April 14, 2008, the Ohio County Circuit Court issued an Order formally amending the Appellant's hearing procedures and denying Petitioner's Motion for Reconsideration. *See,* the August 14, 2008 Order, in the Record. That Order also formally denied the Mutual's Motion for Entry of an Order Granting its Motion to Dismiss and its Motion for Entry of Order Remanding the Non-Renewal to the Mutual for Further Hearing. It is from that final appealable order that the instant appeal was taken.[4]

On August 13, 2008, the Appellant filed its Petition for Appeal of West Virginia Mutual Insurance Company From Rulings of the Circuit Court of Ohio County. On September 11, 2008, Dr. Zaleski filed his response. This Court granted the Petition for Appeal on December 9, 2008. Accordingly, the Appellant hereby files its Brief.

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[4] The Petition for Appeal was the best form of relief available to the Petitioner. Petitioner had considered filing a Writ of Mandamus, but because the August 14, 2008 Order was made a final appealable Order, there was "other forms of relief available," namely a Petition, which made the requirements of a Writ of Mandamus unachievable.

III. ASSIGNMENTS OF ERROR

A. The Ohio County Circuit Court's Refusal to Grant Any Motion in Favor of the Appellant or the Follow the West Virginia Supreme Court's Decision in Favor of the Appellant Rises to the Level of a Violation of the Appellant's Due Process Rights and Calls for the Need to Reverse the Circuit Court's Recent Order and Assign a New Judge.

B. The Ohio County Circuit Court Committed Reversible Error Because It Lacked Jurisdiction to Address the Content of the Mutual's Due Process Hearing Procedures for Non-Renewing Coverage.

C. The Ohio County Circuit Court Committed Reversible Error by Addressing an Issue Which Was Not Ripe for Consideration by the Court Because Dr. Zaleski Never Requested a Due Process Non-Renewal Hearing From the Mutual.

D. The Ohio County Circuit Court Committed Reversible Error by Holding That the Due Process Hearing Procedures Offered by the Mutual in Response to the West Virginia Supreme Court's June 27, 2007 Order Did Not Meet the Minimum Requirements of the West Virginia Supreme Court of Appeals in the *Zaleski* Decision.

E. Assuming the Ohio County Circuit Court Has the Ability to Amend the Hearing Procedures of the Appellant, the Ohio County Circuit Court Committed Reversible Error When it Incorrectly Concluded That the Mutual's Hearing Procedures Were Insufficient.

IV. ARGUMENT

A. The Circuit Court's Refusal to Grant Any Motion in Favor of the Appellant Or To Follow the West Virginia Supreme Court's Decision in Favor of the Appellant Rises to the Level of a Violation of the Appellant's Due Process Rights and Calls for the Need to Reverse the Circuit Court's Recent Order and Assign a New Judge.

1. Standard For Finding Breach Of Procedural Due Process By Judge That Requires Remand Of Proceedings And Appointment Of A New Judge.

One of the fundamental tenets of American jurisprudence is that due process requires that no person may be deprived of life, liberty or property without notice and an opportunity for a hearing. Further, the 14th Amendment to the United States Constitution established that "a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 682 (1930). Like its federal counterpart, the Due Process Clause, Article III, Section 10 of the West Virginia Constitution requires procedural safeguards against State action which affects a "liberty or property interest." Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W.Va. 154, 241 S.E.2d 164 (1977). Further, "when an individual is deprived of a protected property or liberty interest, "procedural due process generally requires that the state provide a person with notice and opportunity to be heard" before such a deprivation occurs." *Warren v. City of Athens*, 411 F.3d 697, 708 (6th Cir. 2003).

The due process procedural safeguards placed to protect an individual's liberty or property interests should also apply equally to a litigant's right to a fair and impartial Judge and litigation process. Specifically, although no rigid standard is in place for gauging whether the conduct of a circuit court judge violates the procedural due process of a litigant, it is widely accepted that "the right to a tribunal free from bias or prejudice is based. . . on the [the] due process clause." *U.S. v. Sciuto*, 531 F.2d 842, 845 (7th Cir. 1976). Further, "the failure to provide a litigant a fair and impartial tribunal before which to adjudicate his private rights is a violation of the due process clause of the United States Constitution." *Payne v. Lee*, 24 N.W.2d 259, 264 (Minn. 1946) *citing Buck v. Bell*, 130 S.E. 516 (Va. 1925); U.S. Const. Amend. XIV. Moreover, the Due Process Clause of the Fourteenth Amendment establishes constitutional floor, not uniform standard, regarding the qualifications of judges...[.]" *Bracy v. Gramley*, 117 S.Ct. 1793 (1997). This constitutional floor "requires fair trial in fair tribunal before judge with no actual bias against defendant or interest in outcome of his particular case. *Id.* at 905.

This Supreme Court has held that the Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its

high function in the best way, 'justice must satisfy the appearance of justice.'" *In re Murchinson*, 349 U.S. 133, 136 (1955).

Our Supreme Court has also declared that "every temptation which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law." *Tumey v. State of Ohio*, 47 S.Ct. 437, 444 (1927).

If it can be demonstrated by a litigant that a Judge acts in such a way that is biased, prejudiced and so violative of his or her life, liberty or property that procedural due process is curtailed, then that Judge should be deemed unqualified to remain seated in judgment upon that matter.

2. Judge Recht Breached The Appellant's Right To Procedural Due Process Throughout The Handling Of The Circuit Court Case.

In the instant case, the Ohio County Circuit Court has conducted the administration of this case and ruled in such a manner that has consistently denied the Appellant procedural due process.[5] From the outset of the case, Judge Recht,

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[5] Based the Appellee's Response to Appellant's Petition for Appeal, the Appellant anticipates an argument from the Appellee regarding the failure of the Appellant to raise the issue of procedural due process at the Circuit Court level. However, this anticipated argument is completely without merit as the individual violations of procedural due process were raised individually as objections at the Circuit Court level and this matter is "substantially novel." In *Reed v. Ross*, 468 U.S. 1 (1984), the Court dealt with the federal habeas jurisdiction of a federal court reviewing a state criminal conviction and held that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." *Id.* at 16. The *Reed* Court further stated that "if counsel had no reasonable basis upon which to formulate a constitutional question. . .it is safe to assume that he is sufficiently unaware of the question's latent existence that we cannot attribute to him strategic moves of any sort." *Id.* at 15.

The *Reed* doctrine has been expanded upon in a variety of settings, which provide light on the scope and application of the legal premise. In particular, Courts have held that "[w]here the defect of constitutional magnitude has not been established at time of trial, failure of counsel to object does not constitute waiver." *Cuevas v. State*, 641 S.W.2d 558, 563; *Ex parte Chambers*, 688 S.W.2d 483, 485 (Tx. 1985). *See also Mathews v. Texas*, 768 S.W.2d 731 (Tex.Ct. App.1989)("If constitutional claim is sufficiently novel, there is no procedural default in failing to make contemporaneous objection). The Court in *Roth v. Weir*, 690 N.W.2d 410 (Minn. App. 2005) set forth some helpful factors for applying the *Reed* doctrine, which are: (1) the issue is a novel legal issue of first impression, (2) the issue was raised prominently in

sua sponte, injected issues into motions that were not properly plead by counsel for Dr. Zaleski, improperly denied the Appellant any sort of procedural due process in the form of a hearing on key issues before the Court and uniformly found in favor of the Appellee.

Specifically, Judge Recht denied the Mutual's Motion to Dismiss or in the Alternative Motion for Summary Judgment without explanation. Judge Recht converted Dr. Zaleski's Cross-Motion for Summary Judgment into a Partial Motion for Summary Judgment and then granted summary judgment to Dr. Zaleski by declaring the Mutual was a "state actor." In fact, Dr. Zaleski failed to plead procedural due process in his Complaint, and he presented this issue for the first time in the his Cross-Motion for Summary Judgment. Clearly, under Rule 8 of the West Virginia Rules of Civil Procedure, the Complaint was required to set forth this claim for relief, and the sudden, *sua sponte* insertion of the issue into a motion for summary judgment provided insufficient notice to the Appellant of the claim. In addition, Judge Recht also denied the Mutual's Motion to Dismiss without granting it the benefit of a legal explanation or basis for denying the motion. Clearly, Judge Recht's initial decision violated the Appellant's right to procedural due process by

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briefing, (3) the issue was implicit in or closely akin to the arguments below, and (4) the issue is not dependent on any new or controverted facts.

In the instant case, Judge Recht made numerous decisions over a several year period that the Appellant now, in retrospect, asserts totaled a violation of its procedural due process. Clearly, each individual violation of procedural due process has been raised in motions before Judge Recht, the West Virginia Supreme Court of Appeals during the first appeal, and raised in this brief, which in some instances are cumulative. The concept of a West Virginia Circuit Court judge's cumulative rulings resulting in a violation of due process is clearly novel as this Court has never addressed this specific issue in the past. In other words, Appellant raised each individual denial of it's rights but there was no way for the Appellant to raise the specific constitutional violation addressed in this brief because it is completely novel. Clearly, when you weigh the *Roth* factors, the facts of this case reflect a novel constitutional legal doctrine, based on the same conduct that is now the basis for two appeals and is not dependant on any new or controverted facts. Based on the facts of this case, there can be no question that the facts of this case fall squarely into the *Reed* doctrine and the due process issues may now be raised on Appeal.

introducing a new claim without proper notice under Rule 8 and failing to provide the Appellant notice of the legal rationale for denying the Mutual's Motion to Dismiss.

Judge Recht then granted extraordinary relief to the Appellee in the form of a mandatory injunction against the Appellant by ordering it to reinstate coverage to Dr. Zaleski under the policy without the benefit of an evidentiary hearing, as required by Rule 65 of the West Virginia Rules of Civil Procedure. The Court's granting such relief is an extraordinary exercise of power, which may be granted after a showing by the moving party of a clear right and an extreme hardship. *See, Lamp v. Locke*, 89 W. Va. 138, 108 S.E. 889 (1921). In this case, Judge Recht exercised his equitable powers without allowing the Appellant the benefit of the procedural safeguards provided by Rule 65, which specifically includes an evidentiary hearing. Clearly, the Appellant was denied its right to procedural due process by not being allowed the benefit of an evidentiary hearing or the other procedural safeguards under Rule 65 to which it was entitled. In fact, the Appellant was denied procedural due process in the form of an evidentiary hearing in spite of its continuous requests to be heard on all of these issues. Specifically, the following request was made of Judge Recht at a February 3, 2006 hearing:

> **The Court**: Okay. I have made the finding that what the insurance company has done in this case in nonrenewal does not comply with procedural due process, period. That procedural due process is set out in the various code sections, and it just– that wasn't complied with.
> **Mr. Offutt**: Our contention is that it was and there's no factual basis for this Court to conclude otherwise without having a hearing.
>
> **The Court**: What kind of a hearing?
> **Mr. Offutt**: A hearing where we call witnesses to determine what happened in Dr. Zaleski's case for his nonrenewal.

See, the February 3, 2006 hearing transcript, at P. 10, l. 12-18, in the Record.

Despite this explanation, Judge Recht still failed to grasp the due process ramifications of failing to conduct such a hearing:

> **The Court:** You proffer to me what the hearing would be. What kind of hearing what would you do?
> **Mr. Offutt:** We would call Dr. Zaleski and any counsel or representatives that he had in the hearing process. We would call people from the Mutual. We may call people from the insurance commissioner as to what they did at that level.

Id at P. 11, l. 18-22.[6]

The Appellant then exercised its only option to obtain justice by appealing the circuit court's ruling on its Motion to Dismiss, or in the Alternative, Motion for Summary Judgment and the Appellee's Cross-Motion for Summary Judgment to the Supreme Court. From that appeal, the Supreme Court issued an order reversing the circuit court on every ground other than the finding that the Appellant was a state actor. Specifically, the Supreme Court, in the *Zaleski* decision, instructed Judge Recht to reverse his earlier decision and to enter an Order granting the Mutual's Motion to Dismiss by clearly stating "insofar as it relates to the ***circuit court's denial of the Appellant's dismissal motion . . . the same is hereby reversed.***" *Zaleski*, 220 W. Va. 311, 647 S.E.2d 747 (2007) (emphasis added). The *Zaleski* decision further remanded the case to the Ohio County Circuit Court with instructions that it "remand the question of non-renewal to Mutual for further hearing in conformity with this opinion. . . ." and ordered the circuit court to "conduct such further proceedings not inconsistent with this opinion as may be required, including the resolution of any disputes which may arise in the course of the Mutual hearing on non-renewal." *Id.*

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[6] The April 27, 2006 Order memorializes the Appellant's objection to the court deciding all the facts set forth in the Order without a hearing and the Ohio County Circuit Court's denial of defendant's motion to have a hearing to establish a factual record regarding the appropriate procedural mechanism. *See*, April 27, 2006 Order Granting Partial Summary Judgment to Plaintiff, in the Record.

Despite the clear instruction from the Supreme Court, following the remand of the case, the circuit court committed reversible error by refusing to follow the mandate of the Supreme Court by denying motions by the Appellant to remand the case to the Appellant and to enter an order granting the Mutual's motion to dismiss, per the *Zaleski* decision. Instead of following the Supreme Court's direction in *Zaleski*, Judge Recht issued a January 9, 2008 letter to counsel of record requiring that the Appellant provide procedural safeguards in excess of those minimum requirements established by the Supreme Court in Syllabus Point 8 of *Zaleski* by approving the Recommended Protocols for an Appropriate Review Process of a Decision by the Mutual, with the following three "major changes":

1. The procedures developed by the Mutual be changed so that the entire burden of proof as to the reason for non-renewal would be on the Mutual;

2. That a provision be added to require the Mutual to inform an affected physician as to the scope of any appellate review;

3. That the composition of the tribunal described in Item VIII of the proposed protocols provide a completely unbiased constituency, which did not include members of the Board of Directors of the Mutual.

Essentially, the parties to this action have polar opposite interpretations of the *Zaleski* decision. The Appellant believes that the *Zaleski* decision dismissed the Appellee's damage claims and remanded the case back to the Appellant, to conduct a non-renewal hearing under the Appellant's current hearing procedures, which it believes contains the due process safeguards required by Syllabus Point 8 of *Zaleski*. Then, based upon the outcome of that hearing, Dr. Zaleski could appeal the decision of the Appellant to the Ohio County or Kanawha County Circuit Court and the appeal process could begin. With respect to this particular issue, Dr. Zaleski and Judge Recht believe the *Zaleski* decision did more than place due process requirements on the Appellant when it does not renew a policy of insurance.

They believe that it allowed the circuit court to re-write the hearing procedures of the Appellant to make it comply with Syllabus Point 8 of the *Zaleski* decision and permits Zaleski to still pursue his damage claims.

The problem with Dr. Zaleski and Judge Recht's interpretation of the *Zaleski* decision, and the instruction that the circuit court "conduct such further proceedings not inconsistent with this opinion as may be required," is that it ignores the clear mandate of this court. At the November 8, 2007 hearing, Judge Recht explained how he interpreted the Supreme Court's language in the *Zaleski* decision that remanded the "question of non-renewal to Mutual for further hearing in conformity with this opinion..[:]"

> **The Court**: The real problem I have with that is the language in the conclusion, which I think you're reading from; Is No. 1, remand the question of nonrenewal to the Mutual for further hearing in conformity with this opinion. **And it's that language "in conformity with this opinion" that gives this Court the power to formulate a plan.**
> **Mr. Offutt**: Well, I think it directs it at the Mutual--
>
> **The Court**: Consistent.
> **Mr. Offutt**: –to make that plan.
>
> **The Court**: I just don't– I don't see where it says that.
> **Mr. Offutt**: Why would you remand the question of non-renewal to the Mutual? Basically, it's telling you to remand jurisdiction of this back to the Mutual to come up with a plan.

See, the November 8, 2007 hearing transcript, P. 26, l. 6-22 (emphasis added), in the Record.

As counsel for the Appellant argued at the hearing, the only authority granted to the circuit court by the Supreme Court in *Zaleski* was the instruction to resolve "disputes which may arise in the course of the Mutual hearing on non-renewal." On its face it seems clear that the Supreme Court remanded the case to the Appellant, not the circuit court, to conduct a non-renewal hearing. The only action Judge Recht was authorized to undertake was to mediate disputes arising

from that hearing. Because that hearing never took place, and, in fact, was never requested by Zaleski, Judge Recht had no jurisdiction to conduct any further proceedings, including requiring the parties to submit proposed hearing procedures, only so he could amend them and enter an order requiring the Appellant to conduct a hearing consistent with his order.

The "mandate" of an appellate court in its order formally advising the lower court of its decision and marks the end of appellate jurisdiction and the return of the case to the lower tribunal for such proceedings as may be appropriate. *State ex el Frazier & Oxley, L.C. v. Cummings*, 214 W.Va. 802, 808, 591 S.E.2d 728, 734 (2003). Moreover, "a circuit court has no power, in a cause decided by the appellate court, to re-hear it as to any matter so decided, and, through the circuit court must interpret the decree or mandate of the appellate court, in entering orders and decrees to carry it into effect, any circuit court decree that is inconsistent with the mandate is erroneous and will be reversed." *Id.* In the instant case, by refusing to follow this Court's order and specific instructions to (1) remand the question of non-renewal to the Mutual for further hearing in conformity with this opinion, and (2) conduct such further proceedings not inconsistent with this opinion as may be required, including the resolution of any disputes which may arise in the course of the hearing on non-renewal, the circuit court went beyond the limited mandate of the Supreme Court. Unfortunately, the Appellant is again left with only the right of appeal to correct the repeated error of the circuit court.

3. Judge Recht Consistently Demonstrates a Bias Against the Appellant.

At times during the administration of this case, Judge Recht demonstrated his bias against the Appellant. In the September 2005 Order, the Judge used harsh and unnecessary language when characterizing the alleged insufficiency of the Appellant's procedural due process procedures, calling them "at best shallow and at

worst a sham." *See,* the September 22, 2005 Order, in the Record. Even the Judge recognized that the use of such language was unsupported by the evidence in the case, somewhat recanting and apologizing for his choice of the word "sham" in the September 22, 2005 Order during a November 15, 2005 hearing. Although the Appellant is respectful of the fact that Respondent has attempted to make an argument that insufficient procedural due process was provided to Dr. Zaleski, since Judge Recht was without any written evidence or hearing testimony on the sufficiency of Appellant's hearing procedures at the time he made this comment, it is unclear what motivated him to make that comment on the record.

Even though Judge Recht may have believed the procedural due process offered to Dr. Zaleski by the Appellant to be insufficient, despite being advised that he was using the wrong statute to judge procedural due process, and despite the fact that he had already apologized once on the record for characterizing the Appellant's hearing procedure as a "shallow sham," he still held the Appellant to the same standard as the insurance commissioner and made the following statement:

The Court: I did make findings that it was a sham, and it was shallow; it didn't happen. This insurance company did not provide procedural due process, period.

Mr. Offutt: In what way?

The Court: In terms of giving him a full and complete hearing. None of 33-2-13 was complied with to the extent that I have before me.

Mr. Offutt: 33-2-13 sets forth the procedure that the insurance commissioner–

The Court: But that is what I'm saying applied here. You need to have some protocol. I'm saying that's what the insurance– what I have said here, before the insurance company in this case, which is a state actor, based upon the opinion that I've already written, before they can not renew, they have to go through the procedure. Where it says "insurance commissioner," read insurance company. I just–

Mr. Offutt: So the Court's ruling, so I understand, it's that internally we have to have a 33-2-13 hearing?

The Court: Set up your– a whole hearing protocol, yes.
Mr. Offutt: Then the appeal from that would be to go to the insurance commissioner and have another 33-2-13.

The Court: No, that appeal to that would come here, or to the Circuit Court of Kanawha County.
Mr. Offutt: And the insurance commissioner would be totally out of the process?

The Court: That's right. So all I'm doing–
Mr. Offutt: So the Mutual is treated differently from every other insurance company in the world in that request?

See, the February 3, 2006 hearing transcript, P. 14, l. 9-24; P. 15, l. 1-20, in the Record.

As evidenced above, holding the Appellant to a standard that no other private insurance company known to the appellant is required to achieve is evidence, in and of itself, of the administrative bias exposed during this process. Judge Recht also took an opportunity to criticize the Legislature for drafting West Virginia Code §33-20F-9, stating as follows during the August 5, 2005 hearing:

The Court: And you take a look at – that's why I say it's like a kaleidoscope, because there are certain findings that you look at it and say this is in the private sector. "Private sector," it uses that term. And then of course, you then have comments such as : The public will greatly benefit from the formation. There's substantial public interest in creating a method to provide a stable medical liability. So the legislature, bless them, tried to cover all the bases, and of course what they do is say: Let's do it and then let somebody else sort out what we really mean. That's all right.

See, the August 5, 2005 hearing transcript, P. 8, l. 11-21, in the Record.

4. Judge Recht's Deprivation of the Appellant's Right to Procedural Due Process Mandates That The Case Be Reversed And Remanded And That A New Judge Be Appointed.

The combination of ruling entirely in favor of Dr. Zaleski on every issue before the circuit court with the utter noncompliance with the Supreme Court's decision in *Zaleski,* and the refusal to give the Appellant a meaningful right to be

heard all add up to a deprivation of the procedural due process rights of the Appellant, at the hands of Judge Recht and the Ohio County Circuit Court. In effect, the only right that the Appellant does have when in front of this Judge in this circuit court is the right to appeal.

Unfortunately, Judge Recht's unfettered bias is both financially costly in the form of defense costs and in the form of uncertainty to the Appellant in dealing with other insureds. Finally, the Appellant does not have an automatic right of appeal to the West Virginia Supreme Court of Appeals, and unless the adverse ruling is significant enough, the issue may not even be appealable. In other words, the Appellant is adversely affected by a judge that will inevitably rule against it because there are many decisions by the Court that will affect the Appellant that are not adequate for appeal or worthy of appeal.

The acts of the circuit court described above violate the procedural due process rights of the Appellant, and as a result, the circuit court's decision should be reversed and the West Virginia Supreme Court of Appeals should direct the circuit court to follow its previous ruling. Specifically, the court should reverse the circuit court's denial of the motion to enter an order dismissing claims in the Complaint, the motion to remand the case and the granting of the motion to amend the Appellant's hearing procedures.

Despite the numerous rulings against the Appellant, Judge Recht's refusal to follow the mandate of the Supreme Court and numerous references in the Record indicating obvious bias, the Appellant has no information that would support a motion for disqualification.[7] In other words, the Appellant cannot ascertain any

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[7] In most situations where a circuit court judge acts with bias or prejudice toward or against a party, the acceptable response is to seek disqualification pursuant to Canon 3 (E) (1) of the West Virginia Code of Judicial Conduct, which states in pertinent part that:

A judge shall disqualify himself or herself in a proceeding in which the judge's

reason for Judge Recht to have a personal bias against it in this case that falls within the confines of the trial court rules and the Canons of Judicial Ethics. Specifically, the Appellant can not identify a personal bias of any sort. As a result, the traditional motions for disqualifications do not provide a satisfactory result.

Appellant is unaware of what might motivate Judge Recht to comment on the sufficiency on a hearing procedures that he had not even seen nor reviewed any written evidence or any information concerning at the time. Unfortunately, this breach of due process cannot be remedied by the rules regarding disqualifications as

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> impartiality might reasonably be questioned including, but not limited to instances where:
>
> (a) the judge has personal bias or prejudice concerning a party or a party's lawyer...,
>
> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter....

W.Va. Code of Judicial Conduct, Canon E.

In the instant case, Judge Recht admitted the following to the parties at one of the first hearings in this matter:

> The Court: I think, at the beginning, should put on the record that, when I was in private practice around 10, 11 years ago, I, of course, was with the law firm that now represents Dr. Zaleski. And Dr. Zaleski was a client of mine at that time. Not in any matters relating to this. I will put on the record and I think I can without divulging anything confidential, it had to do with certain domestic issues. That's the extent of it. I think I also should say, in all fairness even to Dr. Zaleski, that, years ago, many years ago– and I really don't know when; I'm trying to think about this–that I , together with an attorney by the name of G. Charles Hughes, represented–that's how long ago it was, because Charlie has been incapacitated now for at least ten years, but it was maybe 20 years ago– a medical malpractice case in which I represented the plaintiff against Dr. Zaleski. So those are the acts of contrition. I don't think any of those create a problem.

See, the August 5, 2005 hearing transcript, P. 3, l. 9-24; P. 4, l. 1-3, in the Record.

Based upon the above language of Canon 3 (E) (1) of the West Virginia Code of Judicial Conduct, Judge Recht was required to recuse himself from the case, as it created a conflict which the Petitioner believes has resulted in a bias in favor of the Respondent.

rulings on motions are generally understood to be insufficient to disqualify a Judge under the four corners of the rules for disqualification.

The leading West Virginia case on recusal and disqualification is *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995). The issue in *Tennant* was whether a new trial should be granted because Judge Fox failed to disclose to the parties and counsel that one of the defense lawyers was then representing him in federal court in a civil rights action, as a result of actions taken in his official capacity. The court in *Tennant* held that the standard for recusal is not actual bias but rather whether the circumstances are such as would lead an objective person to "harbor doubts" as to the judge's impartiality. The court emphasized that "...avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself": To protect against the appearance of impropriety, courts in this country consistently hold that a judge should disqualify himself or herself from any proceeding in which his or her impartiality might reasonably be questioned. Again, we have repeatedly held that where 'the circumstances offer a possible temptation to the average ... (person) as a judge not to hold the balance nice, clear and true' between the parties, a judge should be recused. (citations omitted).

Traditionally, there must be more than the court's refusal to grant motions and thus, the above rule really does not provide adequate relief for the instant circumstance. However, pursuant to this court's equitable powers and the unusual denial of every motion of the Appellant and the circuit court's refusal to provide a hearing on any of the issues, and *sua sponte* rulings, and rulings made without an evidentiary hearing, and the Judge's refusal to follow the clear mandate of the West Virginia Supreme Court, this court should use its equitable powers to provide a

remedy to the Appellant. In that regard, the Appellant requests that this Court assign a new judge in order to afford it the due process to which it is entitled.

B. The Ohio County Circuit Court Committed Reversible Error Because It Lacked Jurisdiction To Address The Content Of The Mutual's Due Process Hearing Procedures For Non-Renewing Coverage.

In *Zaleski v. West Virginia Physicians' Mutual Insurance Company*, 220 W. Va. 311, 322, 647 S.E. 2d 747, 758 (2007), the Supreme Court reversed the circuit court's decision to deny the Mutual's Motion to Dismiss, stating that "insofar as it relates to the circuit court's denial of the Mutual's dismissal motion **and** order to reinstate insurance coverage, the same is hereby reversed." *Zaleski*, 220 W.Va. 311, 322, 647 S.E.2d 747, 758 (emphasis added). Simply put, the instruction from the Supreme Court of Appeals to the Ohio County Circuit Court, in its June 27, 2007 Order, was to reverse its earlier decision denying the Mutual's Motion to Dismiss pursuant to West Virginia Rule of Civil Procedure 12(b)(6). As such, the Ohio County Circuit Court, upon receipt of that decision, was required to reverse its earlier decision and to enter an Order granting the Mutual's Motion to Dismiss the Complaint. The *Zaleski* decision further held that the case be remanded to the Ohio County Circuit Court with instructions that it "remand the question of non-renewal to Mutual for further hearing in conformity with this opinion. . . ." Further, the circuit court was ordered to "conduct such further proceedings not inconsistent with this opinion as may be required, including the resolution of any disputes which may arise in the course of the Mutual hearing on non-renewal." *Id.* In light of the clear instruction from the Supreme Court to the circuit court concerning the remand, the circuit court's decision to abstractly entertain objections to the Mutual's Hearing Procedures for non-renewal is far beyond the jurisdiction bestowed upon the circuit court by the West Virginia Supreme Court of Appeals and is clear error.

The Ohio County Circuit Court does not have general jurisdiction over the format of the non-renewal hearing or procedures governing the hearing. Instead, the circuit court has jurisdiction over disputes arising in the course of the Mutual's proceedings. Because the circuit court has failed to remand the case to the Mutual pursuant to the *Zaleski* decision, there can be no dispute.

Moreover, after the case was remanded, the circuit court only had limited jurisdiction over this matter to conduct "proceedings not inconsistent with this opinion as may be required." As a result, any act by the circuit court to make general changes to the Mutual's Hearing Procedures, without a dispute arising from a hearing held by the Mutual, is clearly outside the scope of the jurisdiction conferred to the circuit court by the Supreme Court. Therefore, this Court should reverse the circuit court's decision to alter the Mutual's Hearing Procedures and the case should be remanded to the Mutual pursuant to the instruction of the West Virginia Supreme Court of Appeals in its June 27, 2007 decision.

C. The Ohio County Circuit Court Committed Reversible Error By Addressing An Issue Which Was Not Ripe For Consideration By The Court Because Dr. Zaleski Never Requested A Due Process Non-Renewal Hearing From The Mutual.

West Virginia courts have long accepted that a matter must be ripe for consideration and there must be an actual case or controversy before a Court may review it. In this case, the circuit court's abstract review of the Mutual's Hearing Procedures before Dr. Zaleski had requested a due process non-renewal hearing was improper because it was not yet ripe for review.

In *Farely v. Graney*, 146, W. Va. 22, 119 S.E.2d 833 (1960), the Court upheld the long established principal that "courts will not . . . adjudicate rights which are merely contingent or dependent upon contingent events, as distinguished from actual controversies." *See also, Town of South Charleston v. Board of Education of Kanawha County*, 132 W. Va. 77, 50 S.E.2d 880 (1948). Likewise, "courts [will not]

resolve mere academic disputes or moot questions or render mere advisory opinions which are unrelated to actual controversies. *West Virginia Human Rights Com'n v. Esquire Group, Inc.*, 217 W. Va. 454, 618 S.E.2d 463 (2005) (citations omitted). These cases establish the long-standing doctrine requiring a matter to be ripe for consideration and that there be an actual case in controversy before the Court may review it. In this case, the abstract review of the Mutual's Hearing Procedures before the hearing procedure has occurred violates both of these long-standing principles.

In this case, the circuit court was required under the *Zaleski* decision to remand the case to the Mutual for a hearing on the non-renewal of Dr. Zaleski's insurance. The outcome of the hearing is unknown at this time. The hearing could result in Dr. Zaleski being renewed, in which case no abstract objection to the procedures themselves could ever become ripe for consideration. Likewise, as it pertains to the Mutual's Hearing Procedures, there would never be a case in controversy for the circuit court to review. On the other hand, if the Mutual would decide not to renew Dr. Zaleski's insurance, the procedure could be addressed if the objection might change the outcome in the procedures. In this situation, the operation of the Mutual's Hearing Procedure would be analyzed in the context of its operation during the hearing, which has yet to take place. Simply put, to review the Mutual's Hearing Procedures in the abstract before a hearing has even occurred is a clear violation of the long-standing principle of ripeness and the requirement that an actual case in controversy exist before a matter can be reviewed. More precisely, the issues that presently concern Dr. Zaleski may for some other reason become moot, or in the alternative, some other unidentifiable problem may arise. In this case, the circuit court's decision violates the principle of ripeness because the required hearing has yet to take place.

D. The Ohio County Circuit Court Committed Reversible Error By Holding That The Due Process Hearing Procedures Offered By The Mutual In Response To the Supreme Court's June 27, 2007 Order Did Not Meet The Minimum Requirements Of The West Virginia Supreme Court of Appeals in the *Zaleski* Decision.

The circuit court's decision to alter the Mutual's Hearing Procedures goes beyond the hearing procedure requirements set forth by the West Virginia Supreme Court of Appeals in its *Zaleski* decision, and by doing so, the circuit court has ruled inconsistently with the West Virginia Supreme Court of Appeals.

In Syllabus Point 8 of *Zaleski*, 220 W. Va. 311, 321, 647 S.E.2d 747, 757, the Supreme Court specifically instructed the Mutual to create a policy that contained as a minimum the following elements:

1. Notice of the non-renewal which conforms with the requirements of W.Va. Code §33-20C-4(a) and which includes the reasons for non-renewal;
2. Hearing before an unbiased hearing examiner;
3. Reasonable time in which to prepare to rebut the charges;
4. Opportunity to have retained counsel at any hearings on the charges;
5. Opportunity to present relevant evidence which includes calling and cross-examining witnesses;
6. Preservation of an adequate record of the review proceedings.

An examination of the Mutual's Due Process Hearing Procedures for Non-Renewal demonstrates that each element required by the West Virginia Supreme Court has been met by the Mutual.

1. Notice of the non-renewal which conforms with the requirements of W. Va. Code §33-20C4(a) and which includes the reasons for non-renewal.

Under W. Va. Code §33-20C-4(a), an insurer must provide notice "***not less than ninety days prior to the expiration date of the policy.***" W. Va. Code §33-20C-4(a)(emphasis added). In order to meet the first minimum requirement of the

Zaleski hearing procedures, the Mutual must provide the notice no less than ninety (90) days prior to the expiration of the policy and must explain the reasons for non-renewal.

The Mutual's Hearing Procedures meet this requirement under Section I, which is titled "Notice." Under this section, the Mutual provides that it will give an insured ninety (90) days notice prior to the expiration of the insurance policy prior to non-renewal. Likewise, under Section I(3), the Mutual requires that the reason for non-renewal be set forth in the notice. *See, id.* Clearly, the Mutual easily meets the minimum requirement established in *Zaleski*.

2. Hearing before an unbiased hearing examiner.

The Due Process Hearing Procedures offered by the Mutual meet the hearing requirement because Section V of the Hearing Procedures titled "The Hearing Officer" provides that "[a] lawyer with experience in administrative proceedings will preside" over the hearing. Because a lawyer with experience of administrative proceedings will preside, the general laws concerning conflicts of interest pertaining to lawyers will act as a barrier to any lawyer biased toward or against the Mutual or the physician serving as the hearing examiner. As such, the Mutual's Hearing Procedures provide for an unbiased hearing examiner, and this minimum requirement is met.

Moreover, the Supreme Court did not require that the hearing take place before an unbiased hearing **tribunal**, but rather, specifically required a hearing before an unbiased hearing **examiner**. Certainly, had the Supreme Court intended this to mean an unbiased hearing **tribunal**, it would have used those words and required such an undertaking. As such, Judge Recht's requirement that the non-renewal hearing must take place in front of an unbiased hearing tribunal is an expansion of the minimum requirements established by the Court. Regardless, the

Mutual's hearing procedures do, in fact, provide for a hearing in front of an unbiased tribunal. Although the requirement of an unbiased hearing tribunal is beyond the requirements of the *Zaleski* decision, the Mutual has met and exceeded this requirement.

Specifically, Judge Recht's suggested "major change" requiring that any unbiased tribunal used by the Mutual at a non-renewal hearing be composed of non-members of Mutual's Board of Directors is not the law of West Virginia. There is no authority that suggests that the requirement of an unbiased tribunal means that the members of the tribunal have to be independent, non-employees, totally unaffiliated with the insurance company. In fact, West Virginia law has consistently held that the hearing tribunal does not have to be independent of the body required to satisfy the due process standard. *See North v. West Virginia Bd. of Regents*, 160 W.Va. 248, 233 S.E.2d 411 (1977) (finding that the hearing committee including school employees was an unbiased tribunal in action challenging due process procedures); *See also ex rel Rogers v. Bd. of Education of Lewis County*, 125 W.Va. 579, 25 S.E.2d 537 (1943) (the Court determined that an unbiased hearing tribunal does not require an independent tribunal); *see also Clark v. West Virginia Bd. of Regents*, 166 W.Va. 702, 279 S.E.2d 169 (1981) (a hearing for a tenured teacher before a faculty committee made up of faculty members was considered an unbiased tribunal for due process purposes); *see also Beverlin v. Bd. of Education of Lewis County*, 158 W.Va. 1067, 216 S.E.2d 554 (1975)(a School Board dismissing a teacher was not required to provide the teacher a hearing before an independent tribunal).[8]

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[8] Other jurisdictions have adopted this position that a hearing tribunal does not have to be independent of the body; *See also Hoerman v. Western Heights Bd. of Education*, 913 P.2d 684, 688 (Okla. Civ. App. 1996) citing *Sifagloa v. Bd. of Trustees*, 840 P.2d 367 (1992) (holding that"[b]oard members were not disqualified from hearing Plaintiff's case simply because they had taken positions, even in public, on policy issues relating to incumbent administration, in

Again, Footnote 14 to the *Zaleski* decision provides the Mutual has the authority to refuse to renew medical liability policies and this decision is reserved to the Mutual by W.Va. Code §33-20F-9. Although review of non-renewal decisions is warranted under due process principles, to require a tribunal of unrelated individuals as part of the hearing procedure strips the Mutual of this statutory right.

The Mutual met the minimum requirements of a due process procedural hearing imposed in the *Zaleski* decision and, in fact, exceeded those requirements by offering Dr. Zaleski a hearing in front of an unbiased tribunal.

3. Reasonable time in which to prepare to rebut the charges.

The Due Process Hearing Procedures offered by the Mutual meet the requirement that an insured be given reasonable time to prepare to rebut the charges under Section II, which is titled "Time Frames." Specifically, the parties are given an opportunity to meet to set deadlines to discover information and a hearing no less than 40 days from the physician's request for a hearing. *See, Id.* Of course, depending on the deadlines agreed upon by the parties for the discovery activities, the number of days to prepare could be greater. Clearly, this meets with this minimum requirement of the Supreme Court.

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the absence of a showing that they were biased."). *See also Wolkstein v. Reville*, 694 F.2d 35, 41 (2d Cir. 1982)(the Court stating: "[a]dministrators serving as adjudicators are presumed to be unbiased." For purposes of claim that particular decision making procedure is constitutionally defective for want of impartiality, appearance of impropriety does not occur simply where there is joinder of executive and judicial power.) *See also, Ladenheim v. Union Co. Hospital Dist.*, 394 N.E.2d 770, 773-4 (Ill. App 1979)*citing Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512 (4th Cir. 1974)(stating that "[d]ue process does not require that every member of an administrative tribunal be completely unfamiliar with the factual issues presented at a hearing; the only bias and familiarity which disqualifies a member of the tribunal is that which derives from a extrajudicial source and which results in an opinion on the merits based on something other than that which was learned from participation in the case, and mere involvement in the preliminary procedures required to bring the case to a hearing is not equivalent to unacceptable bias and unfamiliarity.)

4. Opportunity to have retained counsel at any hearings on the charges.

The Due Process Hearing Procedures offered by the Mutual meet the requirement that the physician have the opportunity to have retained counsel at the hearing on the charges in Section I of the procedure when it states, "[a]t your expense, you may be represented at the Appeal Hearing by counsel of your choice. You/your counsel may challenge or question the Mutual and its decision at the Hearing and offer evidence or argument in support of your objection to the non-renewal." Because the Mutual's Hearing Procedures grant the right to counsel, this minimum requirement is met.

5. Opportunity to present relevant evidence which includes calling and cross-examining witnesses.

The Due Process Hearing Procedures offered by the Mutual meet the requirement that the insured be allowed to present relevant evidence at the Hearing, including calling and cross-examining witnesses, in Section IV of the procedures, which states that "the physician is eligible to testify, and/or to offer testimony of other witnesses, and/or submit evidence for consideration by the Tribunal. Further, the physician has the right to cross-examine the Mutual at the hearing procedure. As such, this minimum requirement of the Court is met.

6. Preservation of an adequate record of the review proceedings.

The Due Process Hearing Procedures offered by the Mutual meet the preservation of the record requirement because Section X provides that "A court reporter certified in the State of West Virginia will be retained and will record the proceedings. Either party may purchase, at its expense, a copy of the transcript. As a matter of practice, the Mutual will request the original transcript and all exhibits." As with the previous five minimum requirements, the Mutual meets the requirements of allowing the insurer to develop a record on appeal.

In sum, the Mutual's Hearing Procedure meets and exceeds the minimum procedural safeguards required by the West Virginia Supreme Court of Appeals in its June 27, 2008 Order. The three major changes enunciated by the circuit court in its January 9, 2008 letter exceed the minimum procedural requirements set forth by the West Virginia Supreme Court of Appeals in *Zaleski*. As a result, the circuit court is mandating legal restrictions upon the Mutual that exceed and are thus inconsistent with the June 27, 2007 *Zaleski* opinion by the West Virginia Supreme Court of Appeals.

E. Assuming The Ohio County Circuit Court Has The Ability To Amend The Hearing Procedures Of The Appellant, The Ohio County Circuit Court Committed Reversible Error When It Incorrectly Concluded That The Hearing Procedures Were Insufficient.

In his January 9, 2008 letter to counsel, Judge Recht essentially decided that the hearing procedures of the Mutual contained at least three "major changes" or ***issues that needed to be amended in order to comply with the procedural*** due process requirements set forth in *Zaleski* by the Supreme Court. *See,* Exhibit A. His requirement was that the Mutual amend their hearing procedures in the following ways: 1) the procedures developed by the Mutual be changed so that the entire burden of proof as to the reason for non-renewal would be on the Mutual; 2) that a provision be added to require the Mutual to inform an affected physician as to the scope of any appellate review; and 3) that the composition of the tribunal described in Item VIII of the proposed protocols provide a completely unbiased constituency, which did not include members of the Board of Directors of the Mutual.

Although Section D herein addressed the issue of whether the hearing procedures of the Mutual were sufficient under the *Zaleski* requirements, it is worth analyzing below that not only are the hearing procedures sufficient, they meet or exceed the "major changes" suggested by Judge Recht in his January 9, 2008 letter.

1. The Burden of Proof at the Non-Renewal Hearing.

The first issue Judge Recht addressed in his January 9, 2008 letter was placement of the burden of proof during the non-renewal hearing. Presumably Judge Recht believed that it was a violation of procedural due process to place the burden of proof on the insured physician. What Judge Recht failed to appreciate was that under the Mutual's current non-renewal hearing procedures, the Mutual has the initial burden of proof and thus no change is necessary, even assuming the circuit court was capable of making such a change. Specifically, the ninety (90) days written notice prior to the expiration of the current policy of insurance requirement of the Mutual requires the Mutual to provide an explanation for the reason for non-renewal and the hearing procedures and, further, requires a full written brief detailing the basis for the non-renewal to be provided to its insured, fifteen days in advance of the non-renewal hearing. This pre-hearing briefing requirement requires the Mutual to lay out and present its case justifying non-renewal. It inherently narrows the issues upon which the basis of non-renewal was made, putting the doctor on notice as to the reasons he or she was not renewed. The burden of proof then shifts to the insured physician at the hearing, to show why the Mutual is incorrect in reaching its administrative decision to non-renew. Finally, at the non-renewal hearing, by virtue of his having the burden of proof, the doctor gets the first and the last word in and is able to make his argument, hear the Mutual's counter-argument and then offer rebuttal. It is hard to argue that in that scenario the physician wouldn't benefit from having the burden of proof.

2. Scope of any Appellate Review

The second issue incorrectly raised by Judge Recht in his January 9, 2008 letter is the issue concerning an explanation to the insured physician by the Mutual prior to a non-renewal hearing concerning the scope of any appellate review.

However, the circuit court did not explain precisely what that means. In any event, the Legislature did not see fit to designate venues for appeals of Mutual decisions and did not impose a specific appeal procedure; and neither did the Supreme Court in its *Zaleski* decision.

The notice requirement of the Mutual requires that it provide written notice to its insureds no less than ninety (90) days prior to the expiration of the current policy of insurance. In that notice is an explanation that the insured has the right to be represented by counsel. Also part of that notice is an explanation of the right of the insured to challenge the Underwriting Department's non-renewal decision. Presumably retained counsel for the insured would inform the insured of his appellate rights.

3. Unbiased Hearing Examiner/Tribunal

The third issue incorrectly raised by Judge Recht in his January 9, 2008 letter is the issue concerning whether the requirement of the Supreme Court in *Zaleski* of an unbiased hearing examiner can be met by providing a Hearing Tribunal made up of members of the Board of the insurance company.[9] As this

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[9] It is worth noting that the Mutual's adopted hearing procedures are fairly robust in terms of avoiding perceived or actual bias among tribunal members. In relevant part the procedures provide:

> The members of the Mutual's Board of Directors are eligible to serve as a member of the Tribunal unless otherwise subject to recusal. Grounds for recusal exist if the board member participated in the non-renewal decision and/or maintains a family, religious, social, professional or business relationship with the appealing physician that would prevent the member from being fair and impartial to the physician or the Mutual. Recusal is appropriate if a relationship exists that gives the appearance of being unable to be fair and impartial. Recusal is determined solely by the involved board member except in those circumstances where recusal is mandatory. Mandatory recusal must occur when the board member and the appealing doctor have a close personal friendship, a history of a personality conflict, an active referral history and/or a material collaborative or competitive economic relationship. If the physician requests recusal and the member of the Tribunal declines, the Hearing Officer shall resolve the issue only upon a determination that grounds exist for mandatory recusal.

court has acknowledged by Footnote 14 of the *Zaleski* decision, the Mutual has the right to refuse to renew medical liability policies, a decision reserved to the Mutual by W.Va. Code §33-20F-9. Although review of non-renewal decisions is warranted under due process principles, to require a tribunal of unrelated individuals as part of the hearing procedure strips the Mutual of this statutory right to non-renew a physician it deems to be an unacceptable risk. Judge Recht is attempting to create substantive law where both the Legislature and this Supreme Court have not dared to treat. The other glaring problem with Judge Recht's requirement that the Mutual provide an unbiased hearing tribunal made up of individuals who are not members of the Board of the Mutual is that the cases cited by the Supreme Court in the *Zaleski* decision do not support such a requirement.[10] Specifically, in the *Zaleski* decision, the cases of *North v. West Virginia Board of Regents*, 160 W.Va. 248 233 S.E. 2d 411 (1977) and *Jordan v. Roberts*, 161W.Va. 750 246 S.E. 2d 259 (1978) were referenced as being demonstrative of the type of unbiased hearing examiner that must be afforded to an insured during a non-renewal hearing. Both cases are worth discussion. An examination of those two cases clearly demonstrates that the hearing tribunal offered by the Mutual meets and even exceeds the requirements of the *Zaleski* court.

The Plaintiff in *North*, Charles North was a fourth year medical student at West Virginia University who was accused of falsifying his application to medical school. A committee of the faculty and administrators of the medical school held

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[10] A determination that a Board member is inherently biased and unable to serve on a hearing tribunal would wreak havoc among all state agencies. State agencies who are subject to the Administrative Procedures Act and its due process requirements employ a smorgasbord of hearings procedures, some of which call for the Commission or Board members to be the hearing examiner and trier of fact and judge. Some delegate a part or all of those functions out. The fact remains, however, that if the Supreme Court were to affirm Judge Recht's ruling in this matter, practically all state agencies would have to revisit their promulgated hearing procedures and most of them would be precluded from directly conducting the hearings and making the administrative determinations imposed by statute upon them.

hearings to determine what action should be taken regarding Mr. North. After several procedurally flawed hearings, the committee determined that he should be expelled and made that recommendation to the University President who was the final decision maker in the matter. The President upheld the committee's findings. Subsequently, North appealed that decision to the Board of Regents. The Board of Regents upheld the President's decision and the matter was appealed to the circuit court of Kanawha County. Appeal was ultimately had to the West Virginia Supreme Court, which set forth the appropriate elements of due process which should have been required, as in *Zaleski* (A formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence on his own behalf; an unbiased hearing tribunal; and an adequate record of the proceedings.)

In the first consideration of the *North* case, the Supreme Court dutifully noted that the hearing committee was made up of all faculty administrators appointed by the University and that the final decision maker was the President of the University. The Supreme Court did not rule that University faculty and staff or the President, as being the triers of fact or the decision makers, were inherently violative of due process.

As was the case in *North*, in the instant case, Dr. Zaleski failed to show any bias in fact on the part of any of the members of the underwriting committee, and thus failed to demonstrate why a tribunal made up of member of the Mutual's Board would be inherently biased against Dr. Zaleski.

North reappeared back in the Supreme Court after the case had been remanded back to the Kanawha County Circuit Court to determine certain facts. The circuit court, after performing the required fact review, again confirmed

student North's expulsion. Reconsideration in the Supreme Court was again requested, in part, because of the administrative process that ultimately led to the affirmed expulsion. In the subsequent appeal, the Supreme Court for a second time noted the hearing process, including the faculty and administrator hearing tribunal, the President as final decision maker and the Board of Regents were not inherently biased. The second *North* Court specifically ruled that North's challenge to the fairness of the hearing tribunal was not supported.

In the case of *Jordan v. Roberts*, Mr. Jordan appealed a suspension of his driver's license by the Commissioner of Motor Vehicles (Roberts). The suspension was affirmed by the Circuit Court of Kanawha County. The relevant portion of the *Jordan* case was whether the Department of Motor Vehicles provided administrative due process. There are two significant points which arise from a reading of the case. First, *Jordan*, like *North*, involves a hearing before the head of the state agency, in this case the Commissioner. Even though the Court in *Jordan* repeated the required due process elements articulated in *North* which included "an unbiased hearing tribunal," the Court did not find any problem in the hearing and decision in this case being conducted by the Commissioner. Second, the Court in *Jordan* went on to observe that the Department of Motor Vehicles hearing was governed by West Virginia Code 29A-5-1 et seq. (Administrative Procedures Act). While the Administrative Procedure Act imposes many due process requirements, none of them is that the agency officials cannot serve as hearing tribunals. Quite to the contrary, 29A-5-1(d) requires that: "All hearings shall be conducted in an impartial manner. The agency, any member of the body which comprises the agency ... shall have the power to (1) administer oaths ...[.]" The Administrative Procedures Act clearly contemplates that members of the body which comprise the agency may certainly conduct hearings. And, the Court in disposing of *Jordan*

found that the Department of Motor Vehicles likewise passed muster regarding due process.

As in the *Jordan* case, in the instant case there is no evidence of any inherent bias or prejudice against Dr. Zaleski by having members of the Mutual's Board hear his non-renewal hearing. In sum, it appears from West Virginia case law, that "an unbiased hearing tribunal" does not require "an ***independent*** tribunal." When determining whether a party's due process rights have been violated, the Court focuses on whether the tribunal was biased and not whether it was independent. The hearing procedures of the Mutual not only are sufficient and consistent with the requirements of *Zaleski*, but also meet and exceed the content of the "three major changes" added by Judge Recht, even though they are not required to do so. The cases cited by Judge Recht in his January 9, 2008 letter simply don't support his conclusion..

IV. CONCLUSION

For all the foregoing reasons, the Appellant respectfully requests that this Honorable Court reverse the Ohio County Circuit Court's denial of the Mutual's Motion for Reconsideration of its Motion to Dismiss, or in the Alternative Motion for Summary Judgment and the Mutual's Motion for Entry of Order Granting Motion to Dismiss pursuant to Rule 12(b)(6), the Mutual's motion for Entry of Order Remanding the Non-renewal to the Mutual for Further Hearing, and the Circuit Court's *sua sponte* amendment and entry of an Order amending the Mutual's non-renewal hearing procedures. In addition, the Appellant requests that this Court remove Judge Recht from this case, as he is biased against the Appellant and has consistently violated the Appellant's procedural due process. Further the Appellant respectfully requests that it be awarded the costs and expenses incurred in prosecuting this appeal, including reasonable attorney fees, as well as any other relief deemed appropriate by this Court.

RESPECTFULLY SUBMITTED,

WEST VIRGINIA MUTUAL INSURANCE COMPANY

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. _____

WEST VIRGINIA MUTUAL INSURANCE COMPANY, formerly known as WEST VIRGINIA PHYSICIANS MUTUAL INSURANCE COMPANY, a corporation,

Petitioner,

v.

ROBERT J. ZALESKI, M.D.,

Respondent.

CERTIFICATE OF SERVICE

I, D.C. Offutt, Jr., Esquire, counsel for Petitioner, West Virginia Physicians' Mutual Insurance Company, do hereby certify that I served the foregoing, **"Brief of Appellant"** upon the following counsel of record by depositing the same in the United States Mail, first class and postage pre-paid this 12th day of January, 2009:

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